Kong Wing Sum v Public Bank Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO A-02-696 OF 1995
NH CHAN, AHMAD FAIRUZ AND MOKHTAR SIDIN JJCA
13 DECEMBER 1999

Civil Procedure *— Default judgment — Setting aside — Co-defendants successful in setting aside default judgment — Whether applicant could rely on outcome of other defendants' application to set aside default judgment*

The respondent had entered judgments in default of appearance against all four defendants. The first to third defendants were successful in their application to set aside the judgments in default against them. The appellant applied by way of summons-in-chambers to set aside the judgment in default and stated that the respondent had not obtained leave of the court to enter judgment against him as the appellant contended that he was a chargor. The appellant further contended that the reasons advanced in his case was the same as those advanced by the first to third defendants who were successful in their application. Prior to the filing of the application, the appellant had filed a notice of motion to set aside the writ or the service of the writ and to set aside all consequential orders obtained therefrom but was unsuccessful.

Held, dismissing the appeal with costs:

The facts clearly show that the action against the appellant was not a charge action and the leave of court was not necessary. The first to third defendants' application had nothing to do with the appellant's application as the appellant was not a party to the other defendants' application (see p 572D–E). Further, as the appellant had earlier filed a different appeal to set aside the writ or service of the writ and all consequential orders based on the same facts and arguments, the appellant was estopped from adducing evidence or advancing any argument to contradict the court's earlier decision in dismissing the appeal (see p 573C, F–G).

[Bahasa Malaysia summary

Responden telah memasuki penghakiman ingkar kerana ketidakhadiran terhadap keempat-empat defendan-defendan. Defendan pertama sehingga ketiga berjaya di dalam permohonan mereka untuk mengetepikan penghakiman ingkar terhadap mereka. Perayu telah memohon melalui saman-dalam-kamar untuk mengetepikan penghakiman ingkar dan menyatakan bahawa responden belum lagi memperoleh kebenaran mahkamah untuk memasuki penghakiman terhadapnya oleh kerana perayu menegaskan bahawa beliau adalah pemberi gadaian. Selanjutnya, perayu menegaskan bahawa sebab-sebab yang diutarakan di dalam kesnya adalah sama dengan yang diutarakan oleh defendan pertama sehingga ketiga yang

berjaya di dalam permohonan mereka. Sebelum memfailkan permohonan, perayu telah memfailkan notis usul untuk mengketepikan writ atau serahan writ tersebut dan untuk mengketepikan semua perintah-perintah sampingan yang diperolehi daripadanya tetapi telah tidak berjaya.

Diputuskan, menolak rayuan dengan kos:

Fakta-fakta dengan jelas menunjukkan bahawa tindakan terhadap perayu bukanlah tindakan gadaian dan kebenaran mahkamah adalah tidak diperlukan. Permohonan defendan pertama dan ketiga tidak kena-mengena dengan permohonan perayu kerana perayu bukanlah pihak kepada permohonan defendan yang lain (lihat ms 572D–E). Selanjutnya, oleh kerana perayu telah terdahulu memfail suatu rayuan yang berbeza untuk mengetepikan writ dan serahan writ dan semua perintah sampingan, berdasarkan fakta-fakta dan hujahan-hujahan yang sama, perayu diestop daripada memasukkan keterangan atau mengemukakan sebarang hujahan untuk menyangkal keputusan mahkamah yang lebih awal di dalam menolak rayuan tersebut (lihat ms 573C, F–G).]

Notes

For cases on setting aside default judgment, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1547–1555.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (refd)

Appeal from: Civil Suit No 1519 of 1985 (High Court, Ipoh)

Choy Kam Lee (*KL Choy & Co*) for the appellant.

A Sivalingam (*Page Hong* with him) (*Kean Chye & Sivalingam*) for the respondent.

Ahmad Fairuz JCA (delivering the judgment of the court): The appellant had applied to set aside a judgment in default entered against him by the respondent. The application was dismissed by the senior assistant registrar of the High Court Ipoh. The appellant appealed to the judge in chambers. The learned judge dismissed the appeal. The appellant then appealed to this court.

The appellant was sued as guarantor in respect of money lent by the respondent to one Kong Wing Khean trading as Far East Book Store (the first defendant). The respondent also sued Kong Wing Khean (the second defendant) and Chong Ah Thai (the third defendant) as guarantors of the loan. The appellant himself was the fourth defendant.

It was the respondent's case that the writs were served on the appellant and the other defendants on 23 September 1985. As no appearance had

been entered for the appellant and the other defendants, judgment in default of appearance was entered against them on 18 October 1985. On 7 August 1986, the first, second and third defendants applied to set aside the judgment in default. Their application was granted by the High Court on 23 January 1987 ('the decision of 23 January 1987').

On 14 July 1993, the appellant applied by way of summons-in-chambers ('the SIC') to set aside the judgment in default of 18 October 1985. In his affidavit in support of the said SIC the appellant said that the respondent had not obtained leave of the court to enter a judgment in default against him. This, the appellant contended, was necessary as the appellant was a chargor. Consequently, the judgment in default of 18 October 1985 was, according to the appellant, unlawful and invalid in law. This issue was dealt with by the learned judge thus:

> Jika diteliti kepada writ dan penyata tuntutan plaintif, adalah jelas bahawa tuntutan plaintif ke atas defendan keempat bukanlah satu tindakan di bawah gadaian. Tindakan plaintif adalah hanya untuk mendapatkan balik amaun yang terhutang. Oleh itu A 83 k 4 adalah tidak terpakai di sini.

This finding of the learned judge is clearly consistent with the statement of claim. As the action against the appellant was not a charge action, the appellant's contention obviously was unsustainable.

Before this court, the appellant contended that the reasons for his SIC were the same as the reasons advanced by the first, second and third defendants in their application. As such the learned judge had to allow his application too. The learned judge, however, disagreed with the appellant's contention and decided that the decision of 23 January 1987 did not apply to and did not include the appellant as the appellant was never a party to the application of the first, second and third defendants. A scrutiny of the writ of summons against the appellant and the first, second and third defendants would show that the learned judge was right in his decision. On the writ, the defendants were cited thus:

1 Kwong Wing Khean, sole proprietor trading as Far East Book Store
2 Kong Wing Khean
3 Chong Ah Thai (f) all of
No 25, Jalan Selangor, Canning Gardens Ipoh
4 Kong Wing Sum
No 92, Jalan Haji Eusoff
Housing Trust, Ipoh .... Defendants

The words 'all of No 25, Jalan Selangor, Canning Gardens, Ipoh' appear after the number '3'. Clearly, therefore, the address of No 25, Jalan Selangor, Canning Gardens, Ipoh, must be that of the first, second and third defendants. It was also clear that the appellant's address was No 92, Jalan Haji Eusoff, Housing Trust, Ipoh. The SIC filed by the first, second and third defendants showed clearly that the application to set aside the judgment in default was made by the first, second and third defendants. The affidavit in support of the application was made by the second

A defendant on his behalf and also on behalf of the second and third defendants. And they contended that the writ was served on one Lee Sau Pheng who, in an affidavit affirmed on 5 August 1986, confirmed the receipt of several court documents. No mention of documents concerning the appellant was ever made in those affidavits. Based on these arguments, we agree with the learned judge when, in his grounds of judgment, he said:

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> Adalah jelas dan nyata bahawa perintah bertarikh 23 January 1987 adalah untuk defendan pertama, kedua dan ketiga sahaja iaitu pihak-pihak yang memfailkan permohonan untuk mengenepikan penyerahan writ. Untuk membaca perintah tersebut termasuk juga defendan keempat walaupun beliau bukanlah salah satu pihak di dalam permohonan tersebut adalah tidak dapat
> C diterima dan tidak munasabah sama sekali.

In this connection, the appellant had in fact filed a notice of motion dated 28 December 1994 wherein the appellant prayed, amongst other things:

> (1) For a declaration that the order dated 23 January 1987 made by the then Mr Justice Dato' Anuar bin Dato' Zainal Abidin, now the Chief Justice
> D of Malaya, 'that the service of the Writ of Summons on the defendants and all consequential order be and is hereby set aside' also included the fourth defendant.
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> (2) That the fouth defendant be granted leave to file this application.
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> (3) For leave to enter appearance in the above civil suit No 1519–85.
>
> E (4) To set aside the writ or the service of the writ of summons on the 4th defendant.
>
> (5) To set aside all consequential orders obtained therefrom ... .

The motion was dismissed by the High Court at Ipoh on 25 February 1995. Against that dismissal the appellant appealed to this court. On 15 April
F 1996, this court dismissed with costs the appellant's appeal. What is to be noted at this juncture is the fact that the notice of motion also sought to set aside the writ or the service of the writ on the appellant and to set aside all consequential orders obtained therefrom. The affidavits used by the appellant to support his motion contained the same facts and arguments as
G had been put forth in the appellant's affidavits in support of the SIC. In the circumstances, we agree with the learned respondent's counsel's contention that the appellant was estopped from adducing evidence or advancing any argument to contradict this court's decision in dismissing the appeal from the High Court's dismissal of the appellant's motion (see *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 at
H pp 199I–200D).

For the reasons stated above, we dismissed the appeal with costs and ordered that the deposit be paid to the respondent to account for taxed costs.

I *Appeal dismissed with costs.*

Reported by Chin En Tek